IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

PEARCE & MORETTO, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N19L-06-090 WCC
	)	
HYETT'S CORNER, LLC,	)	
	)	
Defendant.	)	
	)	

Submitted: December 1, 2022
Decided: December 22, 2022

VERDICT

G. Kevin Fasic, Esquire; Offit Kurman, P.A., 222 Delaware Avenue, Suite 1105 Wilmington, DE 19801. Attorney for Plaintiff.

Richard L. Abbott, Esquire; Abbott Law Firm, 724 Yorklyn Road, Suite 240 Hockessin, DE 19707. Attorney for Defendant.

CARPENTER, J.

OVERVIEW

The Court held a three-day bench trial beginning on November 29, 2022. The testimony at trial centered on two primary contentions asserted in the Complaint and Counterclaim. First, this litigation began when Pearce & Moretto, Inc.[1] filed a mechanics' lien against Hyett's Corner, LLC.[2] Plaintiff asserts it completed the work required by its contract with Defendant and that Defendant failed to pay the balance of the contract in the amount of $38,870.00. Hyett asserts that the work was not completed properly and $262,468.50 is needed to repair P&M's work. In a Counterclaim, Hyett further alleges that Plaintiff stole 70,394 cubic yards of topsoil valued at $1,029,512.25. This is the Court's decision on the issues presented during the trial.

WITNESSES

During the trial, the Court heard from fifteen witnesses. To avoid duplication, each witness was allowed to provide relevant testimony regarding each party's claims regardless of who called them to the witness stand. The witnesses were:

1. Robert Julian – project manager for the project on behalf of P&M.
2. Eric Jacono – dump truck operator employed by P&M.

[1] Pearce & Moretto, Inc. will be referred to as P&M or Plaintiff, even though it is also the Counterclaim Defendant.
[2] Hyett's Corner, LLC will be referred to as Defendant or Hyett, even though it is also the Counterclaim Plaintiff.

3. Kenneth Graden - heavy equipment operator employed by P&M.
4. Kenneth Monroe – expert for Hyett.
5. Douglas Penoyer - expert for P&M.
6. Gary Farrar – project manager and part owner for Hyett, Windsor Commons project. Due to Mr. Farrar's testing positive for COVID, his testimony was taken via Zoom.
7. Eric Austin – equipment operator for P&M who worked at the Windsor Commons project during all phases.
8. Steven Coats – one of the original residents of the Enclave at Hyett's Crossing.
9. Donna Wise – one of the original residents of the Enclave at Hyett's Crossing.
10. Kevin Wise – one of the original residents of the Enclave at Hyett's Crossing and Donna Wise's husband.
11. John Swan – truck driver employed by P&M who worked at the construction site.
12. Earl Pearce – founder and co-owner of P&M.
13. Joseph Moretto – founder and co-owner of P&M and project manager on site for P&M during phase 3 of the project.

14. Kurt Schultz – one of the parties in the development of the Enclave at Hyett's Crossing and project manager when Mr. Farrar left that role in December of 2018.

15. Ramesh Batta – one of the developers of the Windsor Commons project and his firm, Batta Environmental Associates, Inc. was the engineering firm that developed the site plans.

DECISION

(a) Mechanic's Lien

The lien request of $38,870.00 is related to the final two invoices submitted by P&M. On October 31, 2017, P&M billed $35,750 in an invoice (number 8004) which is included in Exhibit I of Plaintiff's trial exhibits. Defendant paid $21,880.00 against that invoice and then failed to pay the balance of $13,870.00. No explanation for the failure to pay was provided at trial.

On June 15, 2018, a final invoice (no. 8129) for $25,000.00 was submitted to Defendant for payment. Again, there was no direct testimony on why the invoice was not paid. The balance of $13,870.00 for invoice no. 8004 and $25,000.00 for invoice no. 8129 equals the mechanics' lien request of $38,870.00. The only testimony that provided some explanation for non-payment was that of Joseph Moretto, who indicated it was his understanding that Defendant was having cash

flow issues because it was not selling a sufficient number of lots to generate the needed cash.

What is particularly compelling regarding the balance of this contract is that not only had all previous invoices been approved and paid without incident, the two project managers, Mr. Julian for P&M, and Mr. Farrar for Hyett, testified that the work was completed, and the invoices should have been paid. The two project managers had created a system where every two weeks an invoice would be submitted, Hyett would have two weeks to investigate whether the work was completed satisfactorily, and if so, two weeks later that invoice would be paid by Hyett. Again, all previous invoices other than these two had been paid without incident.

In a veiled attempt to justify non-payment, Defendant introduced two documents from Suppi Construction. The first reflected a repair to underground pipes in the amount of $4,000.00. The second was a proposal relating to storm sewer and bio pond repairs in the amount of $73,440.00. However, there was no testimony that the repairs were needed due to the negligence of Plaintiff. Plaintiff had left the site years before, and the site continued to be an active construction area with multiple contractors building homes on approved lots. The Court also notes that even Defendant's expert did not opine that these invoices related to work that Plaintiff had not properly completed.

Simply put, the Court finds that P&M has established by a preponderance of the evidence that it performed the work which had been approved by Defendant's representative and is entitled to the balance of the contract in the amount of $38,870.00.

(b) Topsoil

What has not been solved by this trial is a clear determination of where the topsoil that was removed during the construction ended up. Hyett argues it is no longer on site but has no idea where it has been taken.[3] P&M indicates that the excess topsoil was placed in a borrow pit on the site but has presented no independent evidence to support that contention. All this posturing is truly unfortunate since, with a little cooperation and a dose of common sense, if P&M is correct, topsoil could have been removed and made available to correct the concerns preventing this development from being completed. Instead of being reasonable businessmen, the parties decided litigation was the better alternative. That was truly an unfortunate and expensive decision which will likely end with neither party being satisfied with the result.

That said, there are a couple of nuggets of truth that can be derived from the testimony presented. First, the contract executed in this matter attached a spreadsheet that detailed the work that was to be performed and during which phase

[3] Hyett's effort to connect the topsoil to the Rt. 301 construction was unpersuasive.

of the project. Hyett tries to assert this document is not part of the formal contract between the parties and therefore should not be considered in deciding the issues now before the Court. However, based on the testimony of Mr. Julian and Mr. Farrar, the Court disagrees. The spreadsheet confirms the figures contained in the bid letter of August 12, 2013, and was utilized by Hyett's representative, Mr. Farrar, to determine whether the bid proposal was fair, competitive, and would cover the work requested. The reason Hyett tries so hard to argue this document should not be considered is because it clearly mentions that borrow pits would be created for each stage of the development. This reference also supports Mr. Julian's testimony that he and Mr. Farrar had discussed the cost savings that would be received by using a borrow pit rather than trucking in fill from outside sources. While it appears the use of a borrow pit should have been approved by New Castle County, the relevance is somewhat diminished by the testimony that County inspectors were regularly on the project and would have been aware of the use of borrow pits if they had any concern. If one wants to argue that this simply reflects County inefficiency and failure to perform its responsibilities, it fails to explain the work of Mr. Batta who testified that he would have surveyors on the site nearly every day and receive a report from them every two weeks before approving payment.

Next, we know from photographs taken by Mr. Schultz when he took over for Mr. Farrar that topsoil was still present in large piles as of April 2017. In addition,

at least one photograph appears to support some digging of soil in the area where others have testified that a borrow pit was created. These photographs also undermine the testimony of the early residents who indicated that around the beginning of "Phase 2"[4] trucks were removing material from the site. The residents, of course, have no idea what was in the trucks other than to speculate that it was dirt since some would fall out onto the road and onto their cars as the trucks exited the development from this very active construction site. Evidence was also presented that there was a significant concrete slab from a prior greenhouse that was previously on the property that had to be removed. While the Court certainly finds the testimony of the early residents credible, it does not support the wholesale removal of topsoil.

Third, all appear to agree that the site would have generated a significant amount of topsoil, between 50,000 to 70,000 cubic yards, and removing that amount of topsoil would be a significant undertaking and by one estimate it would take over 5000 truckloads (100 loads a day for 55 days). The Court simply finds that it is beyond any reasonable conclusion that, between representatives of Hyett, County

[4] According to a June 9, 2020, "Memo to File" by Toland S. Van Stan, Jr., PLS of Batta Associates, (Def. Ex. 67) (Pl. Ex. T) Windsor South was constructed in four Phases: 1, 2, 3A, and 3B. In each of the phases, Topsoil, generally not acceptable as common fill, would have been stripped and stockpiled. According to the Memo, Phases 1 and 2 were complete by 2017, and homes were being constructed in Phase 3A and just being started in Phase 3B.

Phase 2 consisted of the remainder of Allspice Drive from the back line of lot 62 to North Olmsted Parkway, Saffron Drive from North Olmsted Parkway to the easterly side of lots 26 and 78, Paprika Place, North Olmsted Parkway, lots 1 to 26, lots 78 to 84 and the Open Spaces adjacent to these road limits.

inspectors and Batta surveyors being on site nearly every day, they would be unaware of such a significant undertaking.

Finally, the Court notes that Hyett approved and paid $60,000.00 for the P&M invoice 7630 of June 30, 2016, for spreading topsoil, and the attached worksheet would reflect that the work was completed. So, if P&M had spread that topsoil by this date, we know from Mr. Schwartz's photographs that a significant amount of topsoil remained in piles, and they had excess topsoil that needed to be disposed of. Filling the borrow pits on site is not an unreasonable conclusion.

After considering the testimony above, the allegations relating to the theft of topsoil are ones asserted by Hyett and it has the burden to establish that claim by a preponderance of the evidence. It is the Court's decision that Hyett has failed to do so and finds in favor of Plaintiff and will not award damages for the alleged topsoil theft.

(c) Scope of Work

In addition to the alleged theft of topsoil, there are also allegations in the Crossclaim that Plaintiff failed to comply with the plans that had been created by Batta and approved by the County. As to these claims, the Court simply finds the evidence lacking to support an award of damages. There is no evidence that actions have been taken to correct these deficiencies allegedly caused by the Plaintiff, or the consequences of those errors. The Court again notes that it appears Batta had

personnel on site to monitor and ensure compliance with the site plans, and Mr. Batta would get an update on progress before approving payment of invoices. This is in addition to the developer's onsite manager who would also approve the work as it progressed and County inspectors who presumably would be checking compliance with the plans. The alleged inconsistent work performed by P&M was approved by Defendant's onsite manager and presumably approved personally by Batta at the time performed. Hyett then paid after having had an opportunity to inspect the completed work over the preceding two weeks.

That said, the Court does find that Defendant has provided sufficient uncontradicted evidence relating to the difficulty of growing ground cover on the public open space due to the lack of quality topsoil. This has been an area of contention with the County at least since 2019. It is a fair assumption that, while Plaintiff did not steal or remove topsoil from the site, the topsoil was used to fill pits that had been created and Plaintiff failed to spread sufficient topsoil on the public areas to grow anything other than weeds. Defendant's expert indicated to resolve this issue 5016 cubic yards of topsoil would be needed. Using the contract unit cost for this soil of $4.04 per cubic yard, the Court will award $20,264.64 to Defendants to bring these areas into compliance. There is also a need to seed and cover the area at a unit price of $1.50 per cubic yard (provided by Defendant's expert) which would

add an additional $7,524.00. As a result, the Court awards damages to Hyett in the amount of $27,788.64.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.